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No. 86-113

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

AMERICAN BAPTIST CHURCHES
IN THE U.S.A., et al.,
Petitioners,

vs.

RONALD W. REAGAN, et al.,
Respondents.

BRIEF OF THE BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Did the court below err in holding that Petitioners, most of whom are Protestant and Jewish religious organizations and their clergy, lack standing to challenge the appointment of an ambassador to the Holy See?

2. Did the court below err in holding that Petitioners' case must be dismissed because it seeks to address a non-justiciable political issue?

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Pursuant to Rule 36.1 of the Rules of this Court, the Baptist Joint Committee on Public Affairs files this brief in support of the petition for a writ of certiorari in the above captioned case. Consent for the filing of this brief has been obtained in writing from the attorneys of record for the parties in this

case. Their original letters of consent have been filed with the Clerk of this Court.

INTEREST OF THE AMICUS CURIAE

The Baptist Joint Committee on Public Affairs is composed of representatives from eight national cooperating Baptist conventions and conferences in the United States. They are: American Baptist Churches in the U.S.A.; Baptist General Conference; National Baptist Convention of America; National Baptist Convention, U.S.A., Inc.; North American Baptist Conference; Progressive National Baptist Convention, Inc.; Seventh Day Baptist General Conference; and Southern Baptist Convention. These groups have nearly 30 million members and reflect the traditional Baptist concern for proper church-state relations. The Baptist Joint

Committee has as one of its mandates the obligation to respond ". . . whenever Baptist principles are involved in, or are jeopardized through, governmental action. . . ." Among Baptists, religious liberty is a fundamental and sacred principle. We believe that the principle of religious liberty as it is embodied in the First Amendment to the Constitution of the United States is at risk in the case at bar.

REASONS FOR GRANTING THE WRIT

Amicus urges that the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit be granted. The court below has decided an important and novel question of federal law in a manner that is inconsistent with the decisions of this Court.

I.

THE DECISION BELOW CONFLICTS WITH THE COURT'S DECISIONS INVOLVING ARTICLE III STANDING AND CASTS DOUBT ON THE ABILITY OF INJURED RELIGIOUS ORGANIZATIONS TO SEEK ENFORCEMENT OF THE MOST FUNDAMENTAL GUARANTEES OF THE FIRST AMENDMENT.

Article III requirements of standing are not satisfied by the abstract or generalized injuries suffered by all citizens as a result of alleged constitutional violations. Similarly, standing does not exist where injuries are speculative in nature. A litigant has no standing to complain about constitutional violations apart from an injury in fact that distinguishes him from the general public. Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982); Schlesinger v. Reservists Committee To Stop the War, 418 U.S. 208

(1974); Flast v. Cohen, 392 U.S. 83 (1968).

Petitioners' complaint is not a generalized citizens' complaint. The injuries alleged are peculiar to Petitioners and are easily distinguished from those suffered by the public at large. Likewise, Petitioners' injuries are not speculative. To the contrary, they are "distinct and palpable" so as to satisfy any reasonable application of the doctrine of standing. See Warth v. Seldin, 422 U.S. 490, 501 (1975).

As a direct and proximate result of Respondents' actions, the petitioning churches and religious organizations have been made objects of official governmental discrimination. They, unlike the Roman Catholic Church, will not have the benefit of diplomatic access to the President of the United States of America.

Additional benefits conferred upon the Roman Catholic Church that are not enjoyed by Petitioners include:

1. free transmittal of church correspondence at taxpayers' expense [First Amended Complaint ¶83(e)],

2. free transportation at taxpayers' expense [Ibid. at ¶83(d)],

3. direct governmental assistance to various church organizations [Ibid. at ¶83(g)], and

4. privileges and protections set forth in 22 U.S.C. §§254a et seq. and the Vienna Convention on Diplomatic Relations (April 18, 1961, 23 U.S.T. 3227, T.I.A.S. numbered 7502) [Complaint ¶89(e)].

By creating formal diplomatic relations with the Holy See, the United States government necessarily communicates that the Roman Catholic Church is to be preferred and that all other

religious organizations somehow are inferior. This preferential treatment of one church and the implicit discrimination against all others is perhaps the most obvious form of injury that could be suffered by a religious organization. It is shocking to imagine that the individuals and organizations who are the objects of this overt act of governmental discrimination do not have standing to challenge this illegal exercise of power. Petitioners have a "concrete interest" in seeing that they receive fair and equal treatment by the United States government as guaranteed by the First Amendment, and the Court should insure that this interest can be protected by providing Petitioners with access to the federal courts. See Allen v. Wright, ____ U.S. ____, 104 S.Ct. 3315, 3328 (1984).

The Court has expressly recognized that when individuals or organizations

are "personally denied equal treatment by the challenged discriminatory conduct," their stigmatic injury is sufficient grounds for Article III standing. Allen, supra, at 3327-28. Clearly, Petitioners have been stigmatized by the President's discriminatory conduct and cast in an inferior light. The Roman Catholic Church is now perceived as having more clout and influence in the United States because of its unique and favored relationship with the President. Conversely, the general public views Petitioners as being "less significant" members of the religious community. First Amended Complaint ¶95(c). Having been personally denied equal treatment, Petitioners should not be denied access to the federal courts to seek redress for their stigmatic injuries.

Unlike Allen v. Wright, supra, the relief sought in this case will correct

immediately the ongoing injury to Petitioners caused by the President's actions. Because Petitioners have fulfilled the causation requirement of Allen and the injury in fact requirement of Flast and its progeny, there is nothing in the decisions of the Court that necessitates the dismissal of this case for reasons of standing.

II.

THE DECISION BELOW CONFLICTS WITH THE COURT'S DECISIONS CONCERNING THE POWERS OF THE PRESIDENT PURSUANT TO ARTICLE II AND MISAPPLIES THE "POLITICAL QUESTION" DOCTRINE SO AS TO ABSOLVE THE PRESIDENT OF HIS LEGAL OBLIGATION TO ACT IN ACCORDANCE WITH THE CONSTITUTION.

The court below held that even if Petitioners had standing to sue, their action must be dismissed because it addresses a non-justiciable political issue. The court's decision is premised on the fact that Article II gives the

President sole authority in the conduct of foreign affairs. Therefore, the court opined, his appointment of an ambassador to the Holy See is not subject to question. This misapplication of the "political question" doctrine is in conflict with the Court's decisions and has the effect of absolving the President of his legal obligation to act in accordance with the Constitution.

A. THE PRESIDENT IS SUBJECT TO THE RESTRICTIONS OF THE CONSTITUTION EVEN IN THE CONDUCT OF FOREIGN AFFAIRS.

As noted, the President has virtually exclusive power to conduct foreign affairs. United States Constitution, Article II, §§2 and 3; Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964); U.S. v. Pink, 315 U.S. 203 (1942). This includes the power to appoint ambassadors subject to the advice and consent of the Senate. However, the President's power is not unlimited. He does not have the

power to violate the First Amendment by appointing an ambassador to a church. The First Amendment amends the entire Constitution and, thus, supersedes and limits the powers conferred upon the President by Article II.

The precise question of the constitutional constraints upon the President's power to appoint ambassadors is sui generis. However, in similar cases involving the President's exclusive power to make treaties, the Court has made it clear that the President must exercise his power in a manner consistent with all other provisions of the Constitution. Reid v. Covert, 354 U.S. 1 (1957); De Geofroy v. Riggs, 133 U.S. 258 (1890). Moreover, the Court has stated, "It is error to suppose that every case or controversy which touches foreign relations lies beyond the judicial cognizance." Baker v. Carr, 369 U.S. 186, 211 (1962).

Other federal courts also have held that the President is subject to the restrictions of the Constitution even in the conduct of foreign affairs. Olegario v. U.S., 629 F.2d 204 (2nd Cir. 1980); U.S. v. Butenko, 494 F.2d 593 (3rd Cir. 1974).

Federal courts simply cannot reject "a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority. The cases . . . reviewed show the necessity for discriminating inquiry into the precise facts and posture of the particular case, and the impossibility of resolution by any semantic cataloguing." Baker, supra, at 217.

In short, it is the responsibility of the Court to see that the Constitution is upheld and that even the President abides by its commands. See U.S. v. Nixon, 418 U.S. 683 (1974). "It is emphatically the

province and duty of the judicial department to say what the law is." Nixon, supra, at 703, quoting Marbury v. Madison, 1 Cranch. 137, 177, 2 L.Ed. 60 (1803).

B. THE APPOINTMENT OF AN AMBASSADOR TO A CHURCH IS STRICTLY FORBIDDEN BY THE CONSTITUTION.

1. First Amendment

Perhaps the most fundamental guarantee of the establishment clause of the First Amendment is that government cannot act in a way that prefers one religion over another. Everson v. Board of Education, 330 U.S. 1 (1947). The constitutional mandate of uniform and equal treatment for all religious groups recently has been reaffirmed by the Court in Larson v. Valente, 456 U.S. 228 (1982). The President's appointment of an ambassador to the Holy See is a blatant violation of this constitutional principle of impartiality.

Any government action granting denominational preferences is inherently suspect and subject to strict scrutiny. Larson, supra. Accordingly, official acts preferring one religious organization over another are prohibited unless they are necessary to accomplish a compelling state interest. Even then the acts must be "closely fitted" to the accomplishment of the state's interest. Larson, supra, at 247. Stated differently, if the state can accomplish its interest without conferring preferential treatment upon a religious organization, it must do so.

The record is totally devoid of proof of a compelling state interest that would justify the appointment of an ambassador to the Holy See. Assuming arguendo that such an interest existed, the government has failed to demonstrate that its

actions are closely fitted to furthering that interest.

2. Fifth Amendment

Respondents' actions also constitute a violation of the equal protection component of the due process clause of the Fifth Amendment. See NLRB v. Sumter Plywood Corporation, 535 F.2d 917 (5th Cir. 1976), cert. denied, 429 U.S. 1092 (1977); U.S. v. Craven, 478 F.2d 1329 (6th Cir. 1973), cert. denied, 414 U.S. 866 (1973).

The essence of equal protection is fairness. Equal protection requires that all individuals or organizations similarly situated be treated alike. City of Cleburne, TX v. Cleburne Living Center, _____ U.S. _____, 105 S.Ct. 3249 (1985).

Where a challenged government action affects the exercise of a fundamental right, the proper equal protection

analysis is one of strict scrutiny. San Antonio Independent School District v. Rodriquez, 411 U.S. 1 (1973). The Court has explicitly held that rights guaranteed by the First Amendment, such as those asserted by Petitioners, are fundamental and, therefore, give rise to strict scrutiny. Williams v. Rhodes, 393 U.S. 23 (1968). Respondents' actions cannot pass constitutional muster under this elevated level of scrutiny.

C. FOR PURPOSES OF RESPONDENTS' MOTION TO DISMISS, PETITIONERS' ALLEGATION THAT THE HOLY SEE IS A "CHURCH" MUST BE ACCEPTED AS TRUE UNLESS THERE IS NO FACTUAL BASIS FOR THIS ASSERTION.

Petitioners' constitutional arguments are based upon their factual assertion that the Holy See is first and foremost a church, and its sovereignty over 108 acres of land in central Italy is incidental to this fact. Petitioners' First Amended Complaint sets forth the unequivocal statement of Archbishop Pio Laghi,

the Apostolic Pro-Nuncio to the United States, in which he flatly contradicts Respondents' assertion that the United States has established diplomatic relations with the Vatican City-State. Archbishop Laghi's statement makes it clear that the diplomatic exchange is with the Roman Catholic Church and not with a civil state.

> [T]he Catholic Church is the only religious body that I know of that engages in direct relations with various states. You recall the confusion and controversy that arose in the media at the time it was announced that the United States and the Holy See intended to re-establish diplomatic ties. Some mistakenly tried to justify the American government's action by implying that it was entering into a diplomatic relationship not with the Roman

> Catholic Church as such, the Holy See, but rather with the sovereign Vatican City-State. First Amended Complaint ¶78. (emphasis added).

The Archbishop's statement is supported by numerous other allegations in the Complaint.

Respondents maintain that, notwithstanding Petitioners' allegations to the contrary, the President's characterization of the Holy See as a civil state rather than a church is conclusive because of his exclusive authority in the conduct of foreign affairs. Again, Respondents are mistaken.

As set forth above, the President's authority in the conduct of foreign affairs is by no means absolute. He like all other government officials is subject to the limitations of the Constitution. Similarly, the Court is not required to "look the other way" when his

characterization of an issue concerning foreign affairs is patently erroneous.

The Holy See has proclaimed publicly that it is a church and that any foreign ambassadors received by the Vatican will be ambassadors to the Roman Catholic Church. The Holy See's own characterization of itself should not be set aside merely because the President thinks otherwise. Allowing the President to define conclusively the nature of the Holy See in contradiction of its own statements to the contrary goes beyond the constitutional separation of powers and confers upon the President unfettered authority that is not intended by the Constitution.

The sole issue under a Rule 12(b)(6) motion to dismiss is whether it appears to a certainty that under the facts alleged in the complaint the plaintiff is not entitled to relief. Jenkins v. McKeithen, 395 U.S. 411 (1969); Ware v.

Travelers Insurance Company, 150 F.2d 463 (9th Cir. 1945). If there is any possible basis under the pleadings for relief, the motion should not be granted. Kochlacs v. Local Board No. 92, 476 F.2d 557 (7th Cir. 1973). Clearly, Petitioners have pled a legally cognizable cause of action, and, therefore, their Complaint should not be dismissed.

CONCLUSION

For the foregoing reasons, Amicus urges that the petition for writ of certiorari filed in this cause be granted.

Respectfully submitted,

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